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No. 89-1298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

REPLY BRIEF FOR THE PETITIONER

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1. Respondent and his amici first argue (Resp. Br. 11-14; Nat'l Gov. Assoc. *et al.* Br. 8-9; NELI/ACLU Br. 3-4) that protection of employees against wrongful interference with their rights under pension plans is a traditional area of state regulation which is of no concern to ERISA. That simply is not true. Respondent and his amici cite no authority for their proposition except the decision below, another very recent state court decision, and two decisions of a single federal district court that was interpreting the law of New York some six years after ERISA was passed.[1] The paucity and recent vin-

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[1] *See K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987); *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980); *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554 (E.D.N.Y. 1981). Though the U.S. District Court for the Eastern District

tage of those decisions would itself seem to refute the claim of tradition. In any event, a pre-ERISA survey reveals that such a state-law based claim was rejected in the only case in which it was presented. *See* Annotation, *Rights and Liabilities as Between Employer and Employee With Respect to General Pension or Retirement Plan*, 42 A.L.R.2d 461, 479 (1955).

The reason why there is no tradition of state regulation of wrongful interference with rights under pension plans is precisely the reason why such regulation relates to pension plans. There is little danger of wrongful interference with employees' rights under plans when such rights are minimal (as, for example, when there is no vesting). It is only when minimum standards are established for plans (such as vesting) that the danger arises that employers will attempt to evade those standards through wrongful discharge or other wrongful interference. The states have had no reason to prohibit wrongful interference with rights under pension plans because traditionally they have not established minimum standards for pension plans.[2]

It was only when Congress established minimum standards for plans in ERISA that it became necessary to establish an enforcement mechanism to assure enjoyment of those rights free from wrongful interference. Thus, while ERISA does not purport to regulate the entire

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of New York "firmly believe[d]" (*Savodnik*, 488 F. Supp. at 825) that the courts of New York would recognize a state-law cause of action for discharge to interfere with the attainment of a pension, it cited no New York case so holding, nor has respondent cited any New York case so holding, either before or after *Savodnik*.

[2] As this Court noted in *Malone v. White Motor Corp.*, 435 U.S. 497, 507, 510-511 (1978), the legislative history of the federal Welfare and Pension Plans Disclosure Act of 1958 disclosed little state regulation of pension plans up to that point. Indeed, there was little state regulation of pension plans until a handful of states acted just prior to ERISA, as exemplified by the Minnesota law at issue in *Malone*, which was passed in April 1974.

employment relationship, it is *vitally* concerned with the one portion of it that plainly relates to plans—where the employer acts for the purpose of interfering with the attainment of benefits under a plan. The employer's purpose to interfere with the employee's rights under a plan is the direct connection with the plan and the factor that marks off this area of the employment relationship.[3]

The field of employee benefit plans therefore includes this portion of the employment relationship, and the effort of respondent and his amici to draw a line between the plan and the employment relationship (preserving the latter for state regulation) must fail. Discharge to interfere with attainment of benefits under a pension plan is the very spot where the plan and the employment relationship overlap.[4] When an employer "makes a commitment systematically to pay certain benefits" through a plan, the obligation to refrain from discharging or otherwise discriminating against an employee for the purpose of interfering with the attainment of those benefits under the plan is just another of the "host of obligations" undertaken in connection with the plan. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

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[3] ERISA pre-emption in this area is completely consistent with the cases cited in the briefs of respondent and his amici (Resp. Br. 21-23, 26-27; Nat'l Gov. Assoc. *et al.* Br. 23; NELI/ACLU Br. 11). Those cases concerned laws addressing other areas of the employment relationship, *i.e.*, where the state laws were not concerned with the employer's conduct because it had a connection with or reference to an employee benefit plan, but rather because it was wrongful for reasons entirely unrelated to any plan.

[4] As explained in detail in our opening brief (at 26-36), the legislative history leaves no doubt that Congress understood protection against wrongful interference with rights under plans to be part of the field of employee benefit plans that it was pre-empting for exclusive federal regulation. *See, e.g.*, 120 Cong. Rec. 29935 (1974), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974* ("*Legislative History*") (Comm. Print 1976), at 4751 (remarks of Sen. Javits) (protection against

That Congress has pre-empted state laws which attempt to redefine or complement this obligation is clear from the text of Section 514. Section 514(b) specifically excepts from ERISA pre-emption state laws concerning such traditional areas of state regulation as insurance, banking, and securities, as well as criminal laws of general application. *See* 29 U.S.C. § 1144(b). It contains no exception, however, for state employment laws. Congress did *not* intend to leave it to the states to decide how to prevent employers from evading the minimum standards of ERISA. That is a task that Congress carried out effectively in Section 510 of ERISA and precluded the states from undertaking in Section 514(a).[5]

2. Respondent and his amici err in contending next (Resp. Br. 11-48; Nat'l Gov. Assoc. *et al.* Br. 10-14; NELI/ACLU Br. 5-9) that Section 514(c)(2) of ERISA limits the class of state laws that may "relate to" a plan and that the Texas common law at issue here is not within that class. Actually, Section 514(c)(2) is not a limitation but an extension of the term "State".

Section 514(c)(2) is not, as respondent and his amici suggest, the definition of the term "State" in ERISA.

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wrongful interference with rights under plan is one of the "14 basic rights" guaranteed by ERISA, along with participation, vesting, accrual, and so forth).

[5] As noted in our opening brief (at 44-45), with the exception of the court below, the federal and state appellate courts that have addressed ERISA pre-emption of state laws regulating employer conduct that is directly connected to the plan, by reason of the employer's purpose to interfere with attainment of benefits under the plan, have uniformly agreed that such state laws are pre-empted. To this unanimous opinion of the federal and state appellate courts has now been added the United States Department of Labor, the agency charged with regulating (29 U.S.C. § 1135), investigating (29 U.S.C. § 1134), and enforcing (29 U.S.C. § 1132 (a)(5), (h)) Title I of ERISA. *See* United States Br. 9-21.

"State" is defined in Section 3(10) of ERISA as "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone." 29 U.S.C. § 1002 (10). Section 514(c)(2) adds to this definition of "State" by providing that, solely for the purpose of Section 514, the term "State" "*includes* a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2) (emphasis added). Rather than contracting the scope of the phrase "relate[s] to," Section 514(c)(2) plainly *extends* the term "State" to reach any instrumentality of a state *if* that instrumentality is attempting to regulate the terms and conditions of employee benefit plans.

The legislative history reveals that Congress intended to extend the term "State" so that "State professional associations acting under the guise of State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized—for example, prepaid legal services programs—whether closed or open panel. . . ." 120 Cong. Rec. 29933 (1974), *reprinted in* 3 *Legislative History*, at 4746 (remarks of Sen. Williams). But Congress understood that simply adding instrumentalities to the definition of "State" would have gone too far, because the phrase "relate to" could then reach the ethical rules of state bar associations or prevent them from disciplining members with regard to their service to pre-paid legal service plans. *See* 120 Cong. Rec. 29949 (1974), *reprinted in* 3 *Legislative History*, at 4789 (colloquy between Sens. Taft and Javits). Therefore, Congress limited this *extension* of the term "State" to activity purporting to regulate the terms and conditions of plans, which only confirms Con-

gress's understanding that, the phrase "relate to" encompasses far *more* than regulation of the terms and conditions of plans.[6]

In all events, respondent's interpretation of Section 514(c)(2) cannot be reconciled with the plain language of Section 514(a). Any law that purports to regulate the terms and conditions of an employee benefit plan necessarily "relate[s] to" that plan. It would have been nonsensical to provide that such laws are pre-empted only "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Moreover, interpreting Section 514(a), this Court has repeatedly stated that the test of pre-emption is whether the state law "has a connection with or reference to" an ERISA-covered plan, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983), and has held state laws pre-empted that did not even arguably regulate the terms and conditions of a plan. *See, e.g., Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988) (state law that *exempts* plan from state regulation "relate[s] to" plan and is pre-empted). Respondent's interpretation cannot be squared with the Court's understanding of Section 514(a)'s language.[7]

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[6] This explains the remarks of Rep. Dent quoted by amici National Governors' Association *et al.* (Nat'l Gov. Assoc. *et al.* Br. 19). Rep. Dent was referring to how ERISA pre-emption cleared away the obstacles thrown up by state professional societies in the same way as the HMO Act of 1973 pre-empted rules of state professional societies that hindered formation of HMO's. The narrow, specific pre-emption of listed state laws in the HMO Act (42 U.S.C. § 300e-10) cannot properly be compared to the sweeping pre-emption of ERISA.

[7] In addition to *Mackey*, respondent's position conflicts with decisions of this Court in three other cases where the state law regulated the administration or operation of the plan, specifically, the manner of processing claims, rather than its terms and conditions. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

In order to maintain his position in light of this Court's prior decisions, respondent would have to depart from the plain meaning of the word "conditions" in Section 514(c)(2). While "conditions" plainly refers to the conditions of eligibility for benefits under the plan, respondent instead would have to read it to mean the surrounding conditions within which the plan operates (a reading that would also be inconsistent with the legislative history cited above). But that understanding of the term "conditions" applies to the Texas law at issue here as well: the Texas law regulates the conditions within which plans operate just as surely as the cited decisions—by regulating one side of the triangular relationship among the employer, the employee, and the plan.[8]

3. Respondent and his amici also fail in their attempt (Resp. Br. 24-27; Nat'l Gov. Assoc. *et al.* Br. 15-18, 24-27; NELI/ACLU Br. 13-14) to come to grips with the

Recognizing this deficiency in respondent's argument, amici National Governors' Association *et al.* (Nat'l Gov. Assoc. *et al.* Br. 10-14) propose a different new test for pre-emption—whether the state law regulates either the terms and conditions or the administration and operation of a plan. That test cannot be derived from any language in the statute, least of all from respondent's and amici's argument regarding Section 514(c)(2), which, according to respondent and his amici, limits pre-emption to state laws regulating the terms and conditions of plans.

[8] Congress understood that effective regulation of the field of employee benefit plans requires regulation of all three sides of the triangle and accomplished such regulation in ERISA: employee versus plan (*e.g.*, vesting requirements), employer versus plan (*e.g.*, funding requirements), and employer versus employee (*e.g.*, protection against wrongful interference with rights under plan). Respondent and his amici admit that state laws regulating the first two sides of the triangle relate to employee benefit plans and are pre-empted (Resp. Br. 20-21; Nat'l Gov. Assoc. *et al.* Br. 14, n.6); they cannot explain why Congress would have failed to provide pre-emption of state laws regulating the third side.

structure and legislative history of ERISA. They have no response to the obvious conclusion that Section 510 of ERISA demonstrates the understanding of Congress that non-interference laws "relate to" plans (and, indeed, are vital to the effective regulation of plans).

Faced with the fact that the Texas law treats a subject that is treated by ERISA, respondent and his amici are forced to argue that Congress intended to allow the states to treat *some* of the subjects treated by ERISA. They base this argument on the fact that Congress rejected a pre-emption provision that was limited to state laws treating the same subjects as ERISA. As explained in detail in our opening brief (at 26-36) and in this Court's opinion in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98, however, from the beginning of its consideration of ERISA, Congress was unwavering in its intention to pre-empt state laws treating the same subjects as ERISA. When, in conference committee, Congress replaced the "same subject" formulation with the "relate to" formulation, it did so only to broaden, not to contract, the scope of ERISA pre-emption.

As for this Court's conclusion (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)) that ERISA's comprehensive civil enforcement mechanism is exclusive, respondent and his amici argue that the exclusive force of ERISA Section 502 is limited to claims for benefits under Section 502(a)(1)(B). However, since violations of Section 510 are remedied by an action under Section 502(a)(3), their position would require the Court to hold that one subparagraph of Section 502(a) provides exclusive remedies and one does not—a distinction that would be out of step with the Court's previous holding that "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." *Id.*

Nor does this Court's recent decision in *English v. General Electric Co.*, 110 S. Ct. 2270 (1990), offer respondent any comfort. In *English*, the Court's analysis was not guided by "explicit statutory language" (*id.* at 2275) commanding pre-emption; the Court specifically distinguished ERISA as an example of a federal statute that *does* explicitly define the extent of pre-emption (*ibid.*). The Court in *English* found the argument for pre-emption unpersuasive because it would have resulted in pre-emption of state criminal laws of general application; ERISA contains an express exception preserving state criminal laws of general application (29 U.S.C. § 1144(b)(4)). The state law in that case had a different purpose from the federal law; here, the state law not only has the same purpose as the federal law (protecting employees' interests in pension plans), but is designed to enforce exclusively federal standards for plans. This Court had previously found that the federal scheme at issue in *English* was to be supplemented by state tort remedies; the Court has previously found that ERISA does *not* permit state tort remedies (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)). The whistleblower remedy at issue in *English* was created 24 years after Congress occupied the field in the Atomic Energy Act; Sections 502, 510 and 514 of ERISA were developed and enacted together as a carefully integrated and exclusive scheme. And, in *English*, the Court expressly distinguished the comprehensive pre-emptive force of the National Labor Relations Act; ERISA pre-emption is modeled on that Act (*Pilot Life*, 481 U.S. at 54-56).[9]

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[9] It should also be noted that *English* was not a wrongful discharge case; the wrongful discharge claim was rejected by the district court and not appealed (110 S. Ct. at 2274 n.4). In this Court, English claimed only that the employer's conduct prior to the discharge was outrageous and remediable under the state tort law (*id.* at 2274-2275). Thus, unlike this case, the employer's conduct was actionable under state law for an entirely different reason from why it might have been actionable under federal law.

4. As for the policy of ERISA, respondent and his amici err (Resp. Br. 24-29; Nat'l Gov. Assoc. *et al.* Br. 18-24; NELI/ACLU Br. 12-13) in citing the *Fort Halifax* case for the proposition that the purposes of ERISA (and ERISA pre-emption) are limited to promoting uniformity in the administrative practices of plans. In *Fort Halifax*, this Court focused on the question of administrative practices, not to determine whether the state law "relate[d] to" a plan, but whether there was a "plan" to which the state law related. The Court held that a "plan" does not exist in the absence of administrative machinery; thus, the Maine law in that case did not relate to a "plan" because it did not affect any on-going administrative machinery or call such an administrative machine into being. 482 U.S. at 12-13. The Court did *not* hold that where, as in this case, there is indisputably an ERISA-covered plan, a state law "relate[s] to" the plan only if it affects the administrative practices of the plan.

Respondent's argument ultimately overlooks the fact that the most fundamental purpose of ERISA, from which all of its provisions spring, is to "promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 90. ERISA promotes the interests of employees in their plans in a variety of ways, of which regulation of the administrative practices of plans is just one. No less important than any other way is assuring that employees enjoy their rights under their plans free from wrongful interference by the employer.[10] In attempting to do the same, the Texas law directly implicates the purposes of ERISA.

[10] Other ways include: assuring that all plans meet minimum standards for participation, vesting, accrual, etc. (Part 2 of Title I of ERISA); assuring that employers make adequate contributions to plans (Part 3 of Title I); assuring that the assets of plans are properly invested (Part 4 of Title I); and guaranteeing benefits when plans terminate with insufficient assets (Title IV).

Indeed, the Texas law threatens to defeat the purposes of ERISA. When considering ERISA, Congress understood that rules which appear on their face to promote the interests of employees could, if too severe, ironically work against the purpose of promoting employees' interests in their plans by discouraging employers from establishing or continuing plans. *See, e.g.*, S. Rep. No. 383, 93d Cong., 1st Sess. 19 (1973), *reprinted in* 1 *Legislative History*, at 1063, 1087; 120 Cong. Rec. 29209 (1974), *reprinted in* 3 *Legislative History*, at 4703-4704 (remarks of Rep. Collier); 120 Cong. Rec. 29951 (1974), *reprinted in* 3 *Legislative History*, at 4797 (remarks of Sen. Bentsen); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 96-100, 104-106; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 10. State-law based causes of action for wrongful interference with the attainment of rights under a plan—imposing potentially different substantive standards of conduct, with different procedural and proof requirements, as well as possible jury trials and punitive damages—are just such types of state laws. They would upset the balance that Congress struck and work against the congressional purpose of promoting employees' interests in plans.

To appreciate the threat, one need only look to an area where Congress did *not* pre-empt state laws—state regulation of the content of insurance policies purchased by insured health plans. In this area, state regulation has had a dramatic effect on employee benefit plans—a massive nationwide shift from insured plans to self-insured plans (or, in some instances, to abandonment of plans) in order to avoid varying state insurance laws.[11] In the

[11] A national survey of employers under the auspices of the Health Insurance Institute of America in 1988 documented the dramatic shift from insured to self-insured plans since ERISA. It concluded that, whereas 5 percent of employees were enrolled in self-insured health plans in 1975, over 60 percent were enrolled in self-insured plans in 1987, and the principal explanation was the desire to avoid varying state insurance laws. Gabel, Jajich-Toth,

same way, as noted in our opening brief (at 39-40), the threat of state court actions, tried to a jury, with punitive damages, would create a strong disincentive to establish or continue pension plans. Even if an employer established or continued a plan, there would be strong pressure to alter the vesting rules in the plan to minimize the risk of lawsuits—either delaying vesting for as long as possible or avoiding the problem by providing full and immediate vesting. And, where an employer operates in more than one state, varying state law requirements would push the employer toward breaking up the plan into separate pieces or reducing the plan to the lowest common denominator—a Hobson's choice that ERISA pre-emption was specifically designed to avoid. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514, 524-525 (1981).

In any event, respondent's casual doubt about the magnitude of the threat is beside the point. Congress employed blanket pre-emption in Section 514(a) in order to avoid any balancing tests—to avoid "endless litigation over the validity of State action that might im-

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de Lissovoy, Rice & Cohen, *The Changing World of Group Health Insurance*, 7 Health Affairs 48, 58-59 (1988).

See also More Companies Choosing to Self-Insure Benefits, N.Y. Times, August 3, 1990, at D10 ("51 percent of the firms that converted to self-insurance from 1981 to 1984 would not have done so if there were no state-mandated benefits."); *Laws on Health Benefits Raise Firms' Ire*, Wall St. J., December 28, 1988, at B1 ("To avoid the added insurance costs, many large companies are adopting self-insurance plans, which are exempt from the mandate laws. And because only those companies that offer health plans are obliged to offer the benefits imposed by the mandates, some concerns have decided not to offer insurance plans at all."); *State Mandates Raise Insurance Costs, Keep Employers from Offering Coverage*, 17 Pension Reporter (BNA) No. 16, at 647 (April 16, 1990) ("Research on the effect of state mandates on employer-sponsored health insurance coverage has shown that mandates increase costs and discourage some employers from sponsoring health coverage for workers. . . .").

pinge on Federal regulation" (120 Cong. Rec. 29942 (1974), *reprinted in* 3 *Legislative History*, at 4770 (remarks of Sen. Javits)).

5. Finally, there is no basis to respondent's contention (Resp. Br. 30) that petitioner cannot raise the ERISA pre-emption defense in this case. This Court has long held that, where the highest court of a state has actually passed on a federal question, any inquiry into how or when the question was raised in the state courts in irrelevant to the exercise of the Court's jurisdiction. *See Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-186 (1945); *see also Orr v. Orr*, 440 U.S. 268, 274-275 (1979); *Raley v. Ohio*, 360 U.S. 423, 436-437 (1959). The Supreme Court of Texas passed on petitioner's ERISA pre-emption defense, and this Court's review of that decision is therefore entirely appropriate.

For these reasons, as well as those set forth in our opening brief, the judgment of the court below should be reversed and remanded.

Respectfully submitted,

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